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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS ADAM LEON, Defendant and Appellant.	G049329 (Super. Ct. No. 09HF0942) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

David M. McKinney, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jesus Adam Leon of 21 counts of committing a lewd and lascivious act upon his stepdaughter, A., beginning when she was 5 or 6 years old and under the age of 14 (Pen. Code, § 288, subd. (a); all further statutory references are to this code) and 7 counts of committing a lewd and lascivious act upon her mother's cousin, M., a child of 14 years of age and at least 10 years younger than defendant. (§ 288, subd. (c)(1).) It also found true the allegation that all counts were committed upon multiple children (§ 1203.066, subd. (a)(7)) and that defendant had substantial sexual conduct with A. when she was under the age of 14. (§ 1203.066, subd. (a)(8).) The trial court denied defendant's motion for new trial and sentenced him to an aggregate term of 50 years 8 months in state prison.

Defendant raises a number of issues on appeal. Three of these relate to the questioning of the defense expert and the prosecutor's misreading of the defense expert's report during cross-examination. Defendant argues the prosecutor committed misconduct in doing so and that his counsel was ineffective because he failed to object and opened the door, by presenting the defense expert's testimony, for the prosecutor to elicit the damaging findings made in the expert's report. Another claim of ineffective assistance is based on his counsel's decision not to accept a stipulation offered by the prosecutor that defendant's daughter, Brittany, had never been molested or witnessed such. Defendant also contends the court erred in instructing the jury with CALCRIM No. 357 (adoptive admissions) and CALCRIM No. 318 (prior statements as evidence), and failing to conduct a hearing into possible misconduct by a juror based on her demeanor. Lastly, he claims cumulative error. We reject these contentions and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Defendant married Angela in 1998. At that time, Angela's children, Chandler and A., were eight and six years old, respectively. Defendant's daughter,

Brittany, was about five months older than A. All three children lived primarily with defendant and Angela and called defendant "dad." For a considerable portion of the time they were together, Angela worked nights as a nurse, while defendant worked days as a mechanic and took care of the children in the evening.

In 2000, Angela gave birth to their daughter, Madison. Two years later, they had a second daughter, Isabella. While Angela was pregnant with Isabella, her 14-year-old cousin, M., went over to help care for the children, often spending the night on the couch and staying the weekend. On many of these occasions, defendant sexually assaulted and raped M. He raped her while she was still 14 years old and continued to abuse her after she turned 15. Defendant told M. not to tell anyone and complained to her that he and Angela were not having sex. After Isabella was born in July 2002, M. stayed to help for a few more weeks before returning to live with her uncle, Jonathan Poore, who was also Angela's stepfather. M. did not tell anyone at the time because she did not think anyone would believe her and did not want to disrupt an apparently happy marriage and family.

Angela left defendant in June 2005, just after Brittany went to stay with her mother in Florida. Angela took the other children with her and filed for divorce shortly after.

In May 2009, Angela took her children and Brittany on a camping trip. During the trip, Brittany asked A. "if her dad ever did anything to [her]." A. responded, yes, he had touched her. Brittany started crying. This was the first time A. told anyone that defendant had molested her.

After the camping trip, A. told her mother and they went to the police to file a report that defendant had committed sexual acts upon A. daily beginning when she was five or six years old. Such acts included touching her nipples and the inside of her vagina, oral copulation and attempted rape. The abuse had continued unabated until she was 11 or 12 years old, right up to when Angela left defendant in 2005. A. did not tell

anyone at the time because she was scared of defendant. Although she did not think any of her siblings knew or saw anything, Chandler remembered walking into defendant's bedroom on several occasions at night and seeing defendant rubbing A.'s breast area when she was 11 or 12 years old. Chandler also did not tell anyone because he was afraid of defendant. The first time he disclosed he had witnessed defendant sexually abusing A. was after she had reported it.

Angela informed Poore of the allegations against defendant. She called him again because she feared defendant would be released. Wondering if M. had seen anything, Poore telephoned M. to tell her defendant had been arrested for molesting A. M. began crying and said, "'Oh, my god, he did it to her. He did it to her.'" A police officer contacted M. shortly after this conversation.

Testifying on his own behalf, defendant denied all allegations and claimed Chandler was lying about what he had seen between defendant and A. in order to keep defendant away. Defendant believed the primary reason the charges were brought against him was to prevent him from having visitation with his children.

Dr. Veronica Thomas, a psychologist specializing in forensic psychology, testified on defendant's behalf. After conducting multiple tests and over 11 hours of interviews, plus reviewing the police reports, she opined defendant possessed neither the character traits of a pedophile nor one who had a sexual deviant interest in children.

On cross-examination, Thomas confirmed that in general child molesters and pedophiles often lie because "the stakes are usually high." As to defendant in particular, she testified he was "prone to be[ing] hostile, tense, and agitated when he feels trapped or threatened"; was "manipulative and self-centered"; had patchy judgment "with occasional lapses of forethought and breakdowns of impulse controls"; "tend[ed] to be suspicious and may exhibit gross misinterpretations of events"; projected "angry feelings and aggressive impulses on to others"; "overreacted to anger in others"; was "resentful and irritable"; "rationalize[d] and excuse[d] himself from blame for any past acts of

retaliation or currently revengeful impulses"; and attempted to avoid self-scrutiny and externalizing conflicts by being unwilling to admit emotional conflicts, as well as upsetting and involving others in his problems. Thomas also found defendant's test results indicated "a strong unwillingness to admit to any kind of common social mores and tends to present himself in an overly positive manner."

Thomas answered affirmatively when asked if honesty and interpersonal relationships were a component in her opinion. The prosecutor then asked, "And you found after the defendant's performance on that test that a major problem for him *is that he lies in his interpersonal relationships*." (Italics added.) Thomas answered, "Yes." She then confirmed that important to her diagnosis was defendant's role in relationships, which was "best characterized as being interested in relationships and having a rather conforming role in them" such as being a husband or a father.

After he was convicted, defendant, represented by new counsel, moved for a new trial in part on the ground that the question of whether defendant lies in his relationships misquoted Thomas's report. The report in fact states, "'A major problem for [defendant] *lies* in his interpersonal relationships. It is likely that he has a history of involvement in intense and volatile relationships and tends to be preoccupied with consistent fears of being abandoned or rejected by those around him.'" (Italics added.) The motion also argued defense counsel had been ineffective in failing to catch this mistake.

The prosecutor admitted misquoting the report but asserted it was "unintentional and based on the abundant examples that preceded the statement of defendant's dishonesty." She maintained Thomas's testimony "accurately represented her experience with defendant." In support, the prosecutor submitted to the court an e-mail from Thomas stating, "I did not then or now believe that my testimony was misquoted at trial in [defendant's] case. I did review my testimony at [defense counsel's]

request and informed him that there was no misconstrual [*sic*] of my written report, its findings or my testimony regarding it."

The court denied the new trial motion. It did not believe the prosecutor had committed misconduct. That Thomas's report contained "certain language in it does not take away from her testimony. She was asked a question and clearly answered [it]. Her answer was, in fact, in the court's opinion, her opinion." Thomas was experienced both in conducting evaluations and in testifying. The court did not believe Thomas was misled or "provided any evidence other than what her opinion was." The court also found "nothing apparent in observing the trial[and] the performance of [defense counsel], that leads the court to believe that he acted ineffectively in any manner, nor is there any evidence presented to the court in which the court can find at this time that . . . his representation fell below the standard of care that would be required in this case and that [defendant] is entitled to."

DISCUSSION

1. The Prosecutor's Admitted Misquotation of the Defense Expert's Report

1.1 Prosecutorial Misconduct

Defendant contends the prosecutor's misquoting of Thomas's report constituted misconduct because it mischaracterized the evidence. The Attorney General responds preliminarily that defendant forfeited this claim by failing to object. Defendant concedes this argument would normally be forfeited and that a motion for new trial does not usually cure the failure to object to prosecutorial misconduct. (*People v. Williams* (1997) 16 Cal.4th 153, 254.) But he argues "forfeiture does not necessarily result" here because this is an unusual case in that defense counsel did not know the prosecutor was misquoting Thomas's writing findings. Exercising our discretion to consider the forfeited

issue on the merits (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6), we nevertheless reject it.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"'" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

The misstatement of evidence by a prosecutor constitutes prosecutorial error. (*People v. Davis* (2005) 36 Cal.4th 510, 550.) "A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.'" (*People v. Hill* (1998) 17 Cal.4th 800, 823.) But defendant has not shown the prosecutor made a misstatement of *evidence* or *fact*, even if she misquoted Thomas's report. The prosecutor was not arguing the case to the jury but rather merely asked a question, which Thomas answered.

Nor has defendant demonstrated the prosecutor misled Thomas into mindlessly agreeing with his question. To the contrary, Thomas has been conducting evaluations and testifying as an expert "probably a couple of hundred times" since 1981, mostly for the defense. As such, she has listened to numerous questions and is capable of self-correcting. For example, when asked if "avoiding self-scrutiny is something that exhibits the character of self-realization and being forthcoming," Thomas initially answered in the affirmatively but thereafter corrected herself, stating, "Oh, no, no. . . . Self-scrutiny is not characterized in that way."

We are not persuaded Thomas was misled into believing she was merely affirming the statements made in her report, unaware of the actual question asked during trial. Rather, it shows she was responding to a question and giving her opinion.

1.2 Ineffective Assistance of Counsel

In order to show ineffective assistance of counsel, a defendant "must demonstrate both deficient performance under an objective standard of professional reasonableness and prejudice under a similarly objective standard of reasonable probability of an adverse effect on the outcome." (*People v. Waidla* (2000) 22 Cal.4th 690, 718.) "If the defendant fails to establish the prejudice component of the ineffectiveness claim, a reviewing court need not determine whether counsel's performance was deficient." (*People v. Hayes* (1990) 52 Cal.3d 577, 608.)

1.2.1 Failure to Object

It is undisputed defense counsel did not object to the question of whether defendant lies in his interpersonal relationships. Defendant claims this failure stems from counsel's mistaken belief that Thomas's report actually said that. Defendant cites the following discussion about the extent to which the prosecutor would be allowed to ask about the negative factors identified in Thomas's report.

The prosecutor explained she intended to elicit negative conclusions made by Thomas, including defendant's "inability to take responsibility for actions which can contribute to his test results. Because they admit that they understand people lie on these test results. She, in fact, says on page – what page did I tell you that – that was on 7." Defense counsel said, "I believe you mean about lying," and confirmed that was on page 7 of Thomas's report.

Defendant contends this shows his "counsel was not sufficiently familiar with his own expert's report and findings to know that . . . Thomas had not spoken of

[defendant] lying (telling a falsehood) at all but had simply noted that the problem 'lay' in his interpersonal relationships," which in turn "denied counsel the ability to effectively question . . . Thomas as to her finding in this regard subsequent to the prosecutor's misleading representations."

The Attorney General agrees with defendant that his counsel made a mistake in not recognizing the prosecutor's misquoting of the report. But she argues the error did not constitute ineffective assistance and even if it did, no prejudice occurred. We agree defendant failed to demonstrate prejudice and do not address whether he received deficient representation.

Defendant argues prejudice is shown by the fact the jury requested Thomas's testimony read back when it was initially split 10-2, shortly after which it returned its guilty verdicts. But he provides no authority for his claim that a request for a readback of Thomas's testimony was, by itself, sufficient to establish prejudice. Nor does defendant explain how the readback leads to his supposition "the misrepresentation by the prosecutor thus contributed mightily to the verdicts." In actuality, the readback disclosed Thomas had testified "a major problem for [defendant] is that he lies *in his interpersonal relationships*" (italics added), not that he tends to lie in general or that he is lying on the stand.

As such, we disagree with defendant he was prejudiced by the prosecutor's quotation of the testimony several times during closing argument. Regarding the prosecutor's arguments that defendant was a liar, this was proper as long as the prosecutor argues inferences based on the evidence and not on the prosecutor's personal belief. (*People v. Sandoval* (1992) 4 Cal.4th 155, 180.) A reasonable inference arises from Thomas's unobjected-to testimony that child molesters and pedophiles often lie, and that defendant "lies in his interpersonal relationships," may grossly interpret events, "rationalize[d] and excuse[d] himself from blame," and "tend[ed] to present himself in an overly positive manner."

Moreover, the jury was instructed that "[n]othing the attorneys say is evidence. In their opening and closing statements, the attorneys discuss the case, but their remarks are not evidence." "'[W]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Defendant offers no reason to believe the jurors did not heed the court's instruction. (*People v. Anzalone* (2013) 56 Cal.4th 545, 557 [absent affirmative evidence to the contrary, appellate court presumes the jury understood and followed the court's instructions].)

1.2.2 Opening Door to Prejudicial Evidence

As an alternative argument, defendant contends his counsel acted ineffectively by presenting Thomas's testimony in the first instance and opening the door to the admission of the negative findings in her report. He acknowledges that reasonable tactical choices are not considered ineffective assistance, and the decision whether to call certain witnesses is considered a matter of trial tactics "unless the decision results from unreasonable failure to investigate." (*People v. Bolin* (1998) 18 Cal.4th 297, 334.) He claims his counsel failed to adequately investigate by not familiarizing himself with Thomas's findings enough to know they portrayed him as a liar. In light of that, defendant argues "any concomitant tactical strategy counsel may have had cannot survive even cursory scrutiny." We disagree.

Other than defense counsel's failure to recognize that Thomas's report did not say defendant lies in his interpersonal relationships, rather than that a problem for him lies in his relationships, defendant has not shown counsel was unfamiliar with any other aspect of Thomas's report. The decision to present Thomas's "testimony reveals the risks inherent in deciding what mitigating evidence of background and character to present on behalf of a defendant whose background and character have been unsavory in

significant respects. The strategy runs the risks of unanticipated and harmful testimony on direct examination and damaging cross-examination or rebuttal. Both risks were realized here. 'What to offer as mitigating evidence may depend on what the prosecution can be expected to present in rebuttal of that evidence. Thus . . . there may be tactical reasons for a defense attorney not to present certain witnesses, or not to offer evidence of particular incidents in the defendant's life or particular traits of the defendant's character.' [Citations.] By the same token, however, there may have been reasonable tactical reasons for counsel's stated strategy in this case, . . . even if it incurred the risks that were realized. . . . [C]ounsel could have reasonably concluded that mitigating evidence was available and decided to proceed with a risky defense because, as they might have reasoned, 'the availability of rebuttal evidence [could not] justify a defense attorney's decision to present no mitigating evidence at all' [citation], or extremely little evidence, under these circumstances." (*People v. Ochoa* (1998) 19 Cal.4th 353, 468-469.)

Here, defense counsel could have reasonably determined it was necessary to present evidence that an expert had determined defendant did not have the character traits of a pedophile or one who had a sexual deviant interest in children. Without such expert testimony, the defense would have consisted of defendant's testimony denying the allegations against him and the testimony of his character witness, i.e., his ex-wife, older siblings, mother, a friend, and his current girlfriend, that defendant was honest and had no deviant interest in children. The result would have been a he-said, they-said situation. It was thus not unreasonable for defense counsel to call Thomas in the belief the jury would more readily believe her as an expert than character witnesses called to present defendant in a positive light.

Defendant relies in part on *In re Jones* (1996) 13 Cal.4th 552, which held that defense counsel was ineffective for, among other things, asking a witness on cross-examination to name the person her mother had identified as the murderer, resulting in

the witness's identification of the defendant. The holding was based on defense counsel's failure to interview the witness "before trial to determine what her answer to that question might be," the fact a police report contained a statement by the witness naming defendant as the killer (making any benefit counsel sought to gain by the possibility the witness would name someone else "illusory" because it "would have opened the door for the prosecution to introduce [the witness's] prior inconsistent statement"), and "the manner in which defense counsel posed his questions . . . made it unlikely [she] would have" identified someone other than the defendant. (*Id*. at pp. 570-571.) Given these determinations, our Supreme Court found it "difficult to discern a reasonable tactical basis for defense counsel's action in eliciting [the witness's] highly prejudicial testimony." (*Id*. at p. 571.)

Here, in contrast, we cannot say defense counsel had no rational tactical purpose in presenting Thomas's testimony. Accordingly, we will not reverse based on this ground. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581 ["Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission"].)

2. Counsel's Failure to Accept Stipulation

Defendant also asserts his counsel was ineffective by declining the prosecution's offer to enter a stipulation showing defendant had never molested his biological daughter Brittany. We are not persuaded.

2.1 Background

The issue arose during a pretrial hearing on the prosecution's motion in limine to have A.'s disclosure to Brittany during the camping trip ruled admissible under the fresh complaint doctrine. Under that doctrine, "proof of an extrajudicial complaint,

made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*People v. Brown* (1994) 8 Cal.4th 746, 749-750.)

While defense counsel had no objection to A.'s disclosure, he did object to the admission of Brittany's question "if her dad ever did anything to" A. insofar as it referenced Brittany's dad. Counsel argued he would be unable to cross-examine Brittany given her unavailability as a witness even though the question implied she knew something about her father and suggested A. testify simply that Brittany asked her if anyone had ever touched her.

The prosecutor offered to stipulate that if called to testify, Brittany would state she had never been a victim of or saw any inappropriate touching by defendant. Defense counsel rejected the proposed stipulation, explaining, "It doesn't take it out of the jur[y's] mind, well, why did she say something like that? . . . If that evidence were to come in, Brittany needs to be on the witness stand to explain that thoroughly to the jury to make them understand why she made that statement, not just, oh, I wasn't molested and I never witnessed molestation."

The prosecutor indicated her willingness to playing Brittany's entire interview, in which Brittany stated she had asked A. the question "if her dad ever did anything to" her "'[b]ecause she looks goth and . . . funny, [so] I thought something must be going on with her.'" But defense counsel believed such a stipulation would not resolve the matter because the jury would still infer Brittany "must know something we don't. Because she specifically mentions [her] father." "And there is really nothing we can do to cure it except put Brittany on [the stand] and have her explain it."

The court found the evidence admissible "for the very limited non-hearsay purpose of showing the complaint was made and the circumstances under which it was made," and offered to read a limiting instruction after the testimony was elicited. Defense counsel agreed, stating "that instruction is about as good as we can do."

During her direct examination at trial, A. testified she had first disclosed the abuse during the camping trip in response to Brittany's question of whether "her dad ever did anything to" her. Following A.'s answer, the court gave a limiting instruction. Later, the court instructed the jury with CALCRIM No. 303, which states, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

2.2 Analysis

Defendant argues his counsel was ineffective because he refused to accept the stipulations offered by the prosecution, including "using the interview tape or transcript, instead leaving the jury to hear, without any qualification or explanation whatsoever, that Brittany asked A. if [defendant] ([her] father) had ever touched her." In his view, "there can be no tactical reason for making no attempt to diminish, or to eliminate, the prejudice attendant to Brittany's question, especially since the means of doing so was made so readily available to defense counsel."

On the contrary, defense counsel may have wished to avoid further attention to the question and answer in light of the limiting instruction given by the court that the jurors were to consider the evidence, not for its truth, but "for the limited purpose of showing under what circumstances this disclosure was made." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1034 ["counsel reasonably could decide not to emphasize the subject"].) To this end, he could have reasonably determined that the admission of the matters contained in the prosecutor's proposed stipulations would be more harmful than helpful. (*Id.* at p. 1035.)

Defendant maintains "[t]o the degree that this was counsel's reason, it was blatantly absurd, for as counsel argued at the very outset, simply putting Brittany's question before the jury would cause them to wonder just why she had asked the question in the first place" and "that damage had already been done." But even if another attorney would have agreed to enter into the proposed stipulations, defense counsel's tactical decision not to in this case does not constitute ineffective assistance. (*In re Scott* (2003) 29 Cal.4th 783, 829.)

Because the record does not affirmatively disclose that counsel lacked a sound tactical reason for not accepting the prosecutor's proposed stipulations, defendant's claim of ineffective assistance fails. (*People v. Fosselman*, *supra*, 33 Cal.3d at p. 581.) We also perceive no prejudice in light of the limiting instruction given by the court at the time of A.'s testimony and the giving of CALCRIM No. 303. Although defendant's speculates "these instructions do not come close to diminishing or eliminating the prejudice," we presume the jury followed the court's instructions absent some affirmative indication in the record that it did not. (*People v. Anzalone*, *supra*, 56 Cal.4th at p. 557.)

3. Error in Instructing on Adoptive Admissions

Defendant contends the court erred in instructing the jury on adoptive admissions. (CALCRIM No. 357.) No error occurred.

3.1 Background

The following evidence was presented at trial. Before defendant was arrested, but after he knew the allegations had been reported to the police, a detective and A. initiated a "covert telephone call" to defendant in an attempt to obtain incriminating statements from him. Defendant told her he was not supposed to talk to her and believed he should not but nevertheless agreed to do so. Defendant knew he should not contact A.

but there was no restraining order preventing contact. He said, "What do you need? I don't know who to trust. I don't know what to think." A. assured him the conversation would remain between the two of them and stated she wanted to talk "about what happened when [she] was little. Remember?" Defendant responded, "I don't know what you're talking about, [A.]" A. pressed, "you have to know what I am talking about. Remember you used to put your mouth on me." At that point, defendant said, "What? I can't talk to you, [A.] I can't talk. Bye." He then hung up.

A police investigator interviewed defendant and asked why he did not talk to A. Defendant said he believed the call was a trap set by Angela and that child protective services (CPS) had told him he should not to talk to A. Police arrested defendant after the interview.

Based on defendant's response to A.'s question whether he remembered placing his mouth on her, the prosecutor requested that the jury be instructed with CALCRIM No. 357, defining adoptive admissions. Both defense counsel and the court did not believe defendant's response could be viewed as an adoptive admission. But the court agreed to give CALCRIM No. 357 in light of its sua sponte obligation to instruct on applicable principles of law. It explained that defendant was asked the questions and the argument will be made his response was not a denial. It was up to the jury to decide whether an adoptive admission occurred.

The court thereafter instructed the jury with CALCRIM No. 357, which provides: "If you conclude that someone made a statement outside of court that (accused the defendant of the crime/[or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true: [¶] 1. The statement was made to the defendant or made in his presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; AND [¶] 4. The defendant could have denied it but did not. [¶] If you

decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

3.2 Analysis

Defendant contends the evidence did not support giving the instruction on adoptive admissions because (1) no reasonable jury could have found he "implicitly admitted A.'s accusation"; and (2) his silence had been compelled by CPS's order for him "not to talk, or to have any contact with" anyone in A.'s family and thus *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240, 49 L.Ed.2d 91] (*Doyle*) should apply. We are not persuaded.

3.2.1 Inference of an Adoptive Admission

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 744-745), that is, """"those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.""""" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) But "[i]t is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

The adoptive admission instruction is based on an exception to the hearsay rule: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.)

"'If the accused responds to the [accusatory statements] with a flat denial, there is no admission and hence nothing that may be received in evidence. If, on the contrary, the truth of the statement is admitted, the statement may properly be introduced. A third situation is presented when the accused stands mute in the face of the accusation or responds with an evasive or equivocal reply. In that situation this court has held that *under certain circumstances* both the statement and the fact of the accused's failure to deny are admissible on a criminal trial as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt.'" (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 380.)

"To warrant admissibility [pursuant to the adoptive admission exception], it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011 (*Edelbacher*).)

Here, a reasonable jury could have found that defendant's conduct in telling A. he could not talk to her and hanging up when asked whether he remembered putting his mouth on her constituted an adoptive admission. (See *In re Jordan R.* (2012) 205 Cal.App.4th 111, 136 [juvenile court could reasonably conclude accused's lack of response and hanging up during a pretext call by a minor victim of sexual abuse an adoptive admission].) Although this was not the only possible reasonable conclusion, it was sufficient to support the trial court's decision to give the instruction. The evidence supports a reasonable inference that A.'s question implied that defendant had placed his mouth on her, and that defendant had a fair opportunity to explain or deny the implication of her questions. Whether defendant's response to the question constituted an adoptive admission was a question for the jury to decide. (*Edelbacher, supra,* 47 Cal.3d at p. 1011.)

Further, CALCRIM No. 357 is cautionary in that it generally protects a defendant from jurors giving unwarranted weight to an ambiguous answer or to a reply that the jury does not find to be a denial of an accusatory statement. (See *People v. Avalos* (1979) 98 Cal.App.3d 701, 711 [error not to give cautionary instruction on adoptive admissions where defendant's response could be construed as a "tacit admission" or as a denial].) The trial court recognized as much in explaining, "CALCRIM [No.] 357 is the only language that cautions [the] jurors as to how to consider that type of evidence. And specifically tells them they cannot consider the statement for any purpose if they do not believe all four elements are made. And particularly element three, which is where I assume your [the prosecutor's] argument would be. The defendant would, under all the circumstances, naturally would have denied the statement if he thought it was not true."

The court did not err in instructing the jury with CALCRIM No. 357.

3.2.2 Application of Doyle

Defendant maintains the giving of CALCRIM No. 357 violates the principles set forth in *Doyle, supra,* 426 U.S. 610. *Doyle* held a defendant's postarrest silence after *Miranda* [*v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*)] warnings are given may not be used "'to impeach the defendant's trial testimony'" (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1555, fn. omitted (*Hollinquest*)) or "'at trial in order to imply guilt from that silence'" (*ibid*.). The reason for this is using """silence for impeachment [is] fundamentally unfair . . . because '*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.'""" (*Ibid*.)

"The mere fact that defendant's silence was exhibited to a private party rather than in response to police questioning does not necessarily preclude a constitutional violation. . . . Rather, we must examine 'the circumstances surrounding defendant's post-*Miranda* silence. *Doyle* need not apply to defendant's silence invoked by a private party absent a showing that such conduct was an assertion of his rights to silence and counsel. [Citation.] On the other hand, when the evidence demonstrates that defendant's silence in front of a private party results primarily from the conscious exercise of his constitutional rights, then *Doyle* should apply.'" (*Hollinquest*, *supra*, 190 Cal.App.4th at p. 1556, relying on *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520 (*Eshelman*).)

Defendant argues the principles of *Doyle* should apply because he was "ordered not to speak with the complaining witness," and thus telling A. he could not talk to her and hanging up on her "cannot legally be deemed an admission of guilt." The contention lacks merit.

First, defendant did not object to the giving of CALCRIM No. 357 on *Doyle* grounds. Such failure forfeits any *Doyle* error claims. (*People v. Tate* (2010) 49 Cal.4th 635, 691-692.)

Second, the record does not reflect the existence of any "order" for defendant not to talk to A. The pages cited by defendant shows CPS had told him he "*shouldn't* contact anyone in the family" because if he went for his visitation with Madison and Isabella he might be served with a restraining order. (Italics added.) Similarly, when asked why he did not talk with A., defendant told the police investigator he thought it was a trap by Angela and also CPS had told him he was "*not supposed* to talk to [A.]." (Italics added.) Although defendant did testify he told A. he had been "court ordered not to talk to anybody in [her] family," the previous two excerpts demonstrates it was CPS that had *suggested* that he not talk to anyone in A.'s family, not a court of law. The record discloses no court order to this effect.

Third, *Doyle*, *supra*, 426 U.S. 610, does not apply to pre-arrest silence. (*Fletcher v. Weir* (1982) 455 U.S. 603, 605-606 [102 S.Ct. 1309, 71 L.Ed.2d 490].) *Fletcher* explained that post-*Doyle* cases had recognized *Doyle* "as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." (*Fletcher*, at p. 606.) Where the failure to speak occurs before a defendant is taken into custody and given *Miranda* warnings, no governmental action "induced the defendant to remain silent before his arrest." (*Ibid*.) In this case, defendant's silence occurred before his arrest. That CPS told defendant he should not talk to A. falls short of governmental action inducing him to remain silent, as there is no evidence CPS "implicitly assur[ed him] that his silence would not be used against him." (*Ibid*.)

Fourth, defendant's reliance on *Eshelman*, *supra*, 225 Cal.App.3d 1513 is misplaced. It involved a defendant *who had received advisements* and then refused to answer his girlfriend's questions on advice of counsel. The appellate court held this reason "exhibited appellant's reliance on his constitutional rights to silence and counsel." (*Id*. at p. 1521.) Here, in contrast, defendant had not been arrested or *Mirandized* and the evidence does not show defendant's silence in front of A. "result[ed] primarily from the conscious exercise of his constitutional rights." (*Id*. at p. 1520.)

By comparison, in *People v. Medina* (1990) 51 Cal.3d 870, the defendant's sister visited him in jail shortly after he was arrested and asked, "'why did you have to shoot those three poor boys?' Defendant did not respond initially and "later indicated he did not wish to talk about the matter." (*Id*. at p. 889.) The "record fail[ed] to show that defendant was given *Miranda* warnings" before his conversation. (*Id*. at p. 890.) *Medina* held that "in the context of the present case, where defendant was engaged in conversation with his own sister, it was not unreasonable to permit the jury to draw an adverse inference from his silence in response to her inquiry as to why he shot the victims. [¶] The record does not suggest that defendant believed his conversation with

his sister was being monitored, or that his silence was intended as an invocation of any constitutional right." (*Ibid*.)

The present case likewise contains no indication defendant believed his conversation with A. was being monitored, or that he intended his silence to be an invocation of a constitutional right. (Cf. *Hollinquest*, *supra*, 190 Cal.App.4th at pp. 1557, 1560-1561 [where post-*Miranda* silence occurred during telephone calls that were interrupted by periodic warnings the calls were being recorded, court found some indication the defendant consciously exercised his constitutional right to remain silent].)

Finally, any claimed error was harmless under any standard. The instruction itself told the jury not to consider defendant's response to the statement "for any purpose" unless, among other things, "[t]he defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true." The jury was also told that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts." (CALCRIM No. 200.) Thus, if, in fact, there was insufficient evidence that defendant would naturally have denied the statement, we may presume that the jury disregarded the evidence. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299.)

4. Error in Giving Unmodified Version of CALCRIM No. 318

A.'s and M.'s disclosures of defendant's sexual acts against them were admitted pursuant to the fresh complaint doctrine. Under that doctrine, such evidence is admissible only "for the limited purpose of showing that a complaint was made by the victim, and not for the truth of the matter stated. [Citation.] Evidence admitted pursuant to this doctrine may be considered by the trier of fact for the purpose of corroborating the victim's testimony, but not to prove the occurrence of the crime." (*People v. Ramirez*

(2006) 143 Cal.App.4th 1512, 1522.) The trial court gave limiting instructions to this effect immediately after A. and M. testified about the circumstances of their disclosures.

After the close of evidence, the court instructed the jury with CALCRIM No. 303, which explained, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." The trial court also instructed the jury with CALCRIM No. 318, which informed the jury it could consider a witness's prior, out-of-court statements in two ways: "1. To evaluate whether the witness's testimony in court is believable; AND [¶] 2. As evidence that the information in those earlier statements is true."

Defendant contends the giving of this unmodified version of CALCRIM No. 318 was error because it told the jury "that when considering statements made before trial, they could use the statements as evidence of the truth of the matters asserted in those statements." According to him, the trial court should have modified the instruction to state the fresh complaints by A. and M. "could be used only 'to evaluate whether the witness' testimony in court is believable" and such error violated his rights to due process and a fair trial.

The Attorney General argues the claim has been forfeited, and that any error was harmless in any event. We agree.

Defendant acknowledges his counsel did not object to the use of CALCRIM No. 318 but claims the issue has not been forfeited because jury instructions affecting a defendant's substantial rights are reviewable on appeal without an objection. But he concedes CALCRIM No. 318 is generally a correct statement of the law regarding a witness's prior statements (see generally *People v. Solórzano* (2007) 153 Cal.App.4th 1026, 1038-1039) and does not claim the evidence does not support the giving of the instruction. Thus, "[i]f defendant believed that a modification to [CALCRIM No. 318] was required, he was obligated to request it." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.)

Defendant did not ask the trial court to modify CALCRIM No. 318. His failure to do so forfeits this claim. (*People v. Sully* (1991) 53 Cal.3d 1195, 1218; see *People v. Tuggles* (2009) 178 Cal.App.4th 1106, 1130 [failure to request modification or amplification of CALCRIM Nos. 318 and 335 forfeited claim they "erroneously instructed the jury"].)

In any event, the failure to modify CALCRIM No. 318 in the manner suggested by defendant was harmless. Although the unmodified version of CALCRIM No. 318 given in the present case did not inform jurors of the limited purpose for which fresh complaint evidence may be used, the limiting instructions given after the fresh complaints were disclosed during trial, combined with the giving of CALCRIM No. 303, performed that task.

The court's inadvertent misstatement in its limiting instruction following A.'s testimony, that the jury was to consider the disclosure "not [sic] only for" the purpose of showing the circumstances under which the disclosure was made, does not persuade us otherwise. "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) No such likelihood exists.

After A.'s disclosure on the stand, the court instructed the jury that it "allowed in evidence of the disclosure from A. to Brittany and the question that Brittany asked A. That evidence is not being admitted to prove that the words spoken by either A. or Brittany had any specific meaning or were actually true. Being admitted for the limited purpose of showing under what circumstances this disclosure was made and you're to consider not [sic] only for that purpose. Not for the truth of the words that were actually spoken." Read in its totality, the instruction twice informed the jury that the disclosure could not be considered for the truth of the words spoken.

The limiting instruction following M.'s examination informed the jury her statements "made to Jonathan Poore . . . are not being admitted to prove the truth of what M. actually said to Jonathan Poore. They are being admitted only to show . . . under what circumstances this disclosure was made and the context of that disclosure. It is not to be considered by you for the truth of the words that were actually spoken."

A reasonable jury hearing these limiting instructions would not have applied them in an impermissible manner, notwithstanding the court's inadvertent use of the word "not" in its limiting instruction as to A.

Moreover, A. and M. both testified at trial and the jury could "judge [their] credibility" firsthand without relying on their "secondhand statements to other people." (*People v. Manning* (2008) 165 Cal.App.4th 870, 881.) Because their "fresh complaint statements were consistent with and cumulative to [their] trial testimon[ies] . . . any instructional error was harmless." (*Ibid*.; see *People v. Ramirez*, *supra*, 143 Cal.App.4th at p. 1526 [erroneous admission of fresh complaint evidence without restriction was harmless when victim testified about the rape at trial and jury had the opportunity to hear directly from victim and to judge her credibility].)

5. Failure to Conduct Hearing into Juror Misconduct

Defendant contends the court erred in failing to hold a hearing to determine whether there was cause to discharge a juror who was "rolling her eyes, constantly flipping her head back, [and] appearing to be very antagonistic and nasty." Defense counsel brought the issue up after the prosecution rested its case. He noted, "she is extremely flippant about this case to the point to where I am having concerns of her impartiality and fairness and her ability to deliberate." Because "there is really not much of a record about it," counsel asked if anyone else noticed it "because I think it's becoming a real problem." The prosecutor observed the juror had "this demeanor" and appeared "very angry." The court described it "more like a scowl" and did not know

what it meant as it did not appear to be directed at the court or counsel. It had noticed the juror and her expressions but had not "seen her do anything flippant." The court declined to take any action at that point but stated it would "continue to pay attention" and invited either side to raise it again if deemed necessary.

Following the close of evidence, the court brought the issue up again, stating, "I have throughout the remaining portion of the trial . . . observed her demeanor. I did not observe anything that causes the court concern with respect to her not following any of the orders of the court nor is there any reason to believe she is acting in any manner other than what she has been instructed to do" and did not find she was unwilling to deliberate. "[O]ther than lack of expression," the court did not observe anything in her demeanor that would indicate she was not listening, paying attention or observing. Defense counsel agreed, "[s]he's back[ed] down her attitude a little bit."

After the jury convicted defendant, defendant moved for a new trial claiming, in part, the court erred by not conducting an examination of the juror. The court denied the motion, explaining that it had observed the juror "for some considerable time" after the issue was raised. It had "paid particular interest to the juror" but did not observe any conduct indicating the juror "was about to or had committed any type of misconduct" as there was no evidence or fear the juror was biased or failed to deliberate.

On appeal, defendant repeats his argument that the court erred by not conducting a hearing with the juror. We disagree.

"[N]ot every incident involving a juror's conduct requires or warrants further investigation. 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] . . . [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties

and would justify his removal from the case.'" (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.)

A trial court has no duty to hold a hearing where the evidence shows merely expressions of "momentary exasperation with the proceedings," such as apparently directing toward defense counsel the derogatory remark, "'Oh, you son-of-a-.'" (*People v. Kaurish* (1990) 52 Cal.3d 648, 694.) As in this case, the defendant there argued "that once the court was put on notice that a juror might be biased against his counsel, it had a sua sponte duty to inquire into the state of mind of the juror making the remark to determine if he could still be impartial." (*Ibid.*) Our Supreme Court rejected the claim, as "the juror's derogatory remark does not appear to be the result of 'improper or external inferences,' but rather his or her momentary exasperation with the proceedings. Because the record shows no such inferences, nor an indication of serious bias, we find that the court's failure to inquire sua sponte into the juror's state of mind is not error." (*Ibid.*) Likewise, here, defendant has not shown the juror's conduct was the result of "'improper or external inferences'" or "serious bias" as opposed to "momentary exasperation with the proceedings." (*Ibid.*) The court thus did not abuse its discretion in not conducting a hearing with the juror.

6. Cumulative Error

Lastly, defendant claims cumulative error. Because we have concluded that all his claims of error are meritless or harmless, there is no cumulative error. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O’LEARY, P. J.

FYBEL, J.